Supreme Court, U.S.
FILED
DEC 1 9 1998
OFFICE OF THE CLERK

Case Numbers 98-827, 98-6890

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

IN RE: ANN ALDRICH,

Petitioner,

JOSEPH SMITH,

Petitioner,

v.

REGINALD WILKINSON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONSOLIDATED BRIEF IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

A. The Issues Presented Have Been Effectively Mooted by the Prison Litigation Reform Act 4

B. The Petitioners' Arguments Regarding Mandamus Standards Are Not Properly Before the Court and Raise Nothing More Than Harmless Error 5

C. The Decision Below Was Consistent With the Principles Set Forth in *Lewis v. Casey*, 518 U.S. 343 (1996) 6

CONCLUSION 8

TABLE OF AUTHORITIES

PAGE(s)

Lewis v. Casey, 518 U.S. 343 (1996) 6, 7

In re Parker, 49 F.3d 204 (6th Cir. 1995) 5, 6

Price v. Johnson, 334 U.S. 266 (1948) 5

Schwab v. Berggren, 143 U.S. 442 (1892) 5

Turner v. Safley, 482 U.S. 78 (1987) 7

Will v. United States, 389 U.S. 90 (1967) 6

FEDERAL STATUTES

18 U.S.C. § 3626.....5

28 U.S.C. § 2111 6

42 U.S.C. § 1983.....1, 5

Prison Litigation Reform Act,
P.L. 104-134, 110 Stat. 1321.....4, 5

OTHER AUTHORITIES

A. Meehan, *Judicial Business of the United States Courts: 1977 Report to the Director*
(Administrative Office of the Federal Courts).....4

R. Hanson and H. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* (Bureau of Justice Statistics,
U. S. Dept. of Justice, 1995).....5

STATEMENT OF THE CASE

Petitioner Smith is a state prisoner with a long history of abusive behavior. Outside of prison, he subjected between ten and twenty women to violent sexual assaults. Once in custody, he apparently sublimated those urges into litigation, filing multiple lawsuits and barraging courts and corrections officials with hundreds of pleadings. His litigation history includes multiple requests for injunctive relief and demonstrated abuse of the discovery process. To date, none of his actions have been found to have merit.

These petitions spring from Smith's latest cases, a set of three largely duplicative *pro se* actions under 42 U.S.C. § 1983 filed in late 1994 and early 1995 against the Respondents, all of whom are officials or employees of the Ohio Department of Rehabilitation and Correction ("ODRC"). Smith deluged the Respondents with 387 conventional discovery requests and multiple *ex parte* subpoenas *duces tecum* but refused to examine the documents produced pursuant to those requests and subpoenas.

Petitioner Aldrich, the district judge presiding over the cases, appointed counsel for Smith in April 1995. Shortly after counsel was appointed, the Respondents provided Smith's counsel with copies of their responses to Smith's *pro se* discovery requests, answered further discovery requests from Smith's counsel and filed a consolidated motion for summary judgment, effectively giving Smith a "road map" to their case.

The cases were essentially dormant until the spring of 1996. At that time, Smith's counsel sought to take the Respondents' depositions. The Respondents agreed, but pursuant to standing ODRC policy, objected to Smith being

present at those proceedings. Pursuant to that policy, Smith was free to confer with his counsel both before and after the depositions and the Respondents offered to provide telephonic contact between Smith and his counsel during the depositions.

That was unsatisfactory to Smith's counsel and a motion was filed to compel Smith's presence at the depositions. The motion did not explain what about the cases uniquely required Smith's presence or why the prior discovery and alternate arrangements were insufficient to enable his counsel to take meaningful depositions. Instead, the only explanation given was the generalized statement by one of his attorneys that she "find[s] it to be of great assistance to [her] to have [her] clients' at [her] side, as they contribute significantly during the deposition by listening to the testimony and advising [her] on the spot as to certain issues."

The Respondents replied to that motion by producing evidence of Smith's individual history of abusive behavior and of the disruptive effects that would likely follow from allowing prisoners to attend the depositions of corrections staff. More specifically, they produced evidence from corrections officials with more than sixty years' experience indicating that allowing inmates to attend depositions would likely:

-- Undermine the supervisory authority of staff.

-- Provide a means for litigious inmates to aggrandize themselves within the prison population.

-- Cause needless tension between staff and prisoners.

-- Make staff more reticent to exercise their lawful authority.

-- Waste limited resources.

A portion of that evidence is reproduced at pages A31-A40 of the petition in Case No. 98-827. None of that evidence was objected to or rebutted. In spite of that lopsided record, Judge Aldrich ordered that Smith must be allowed to attend the depositions.

Because of the very real problems described in above, the Respondents sought relief from that order by filing a petition for mandamus or prohibition in the Sixth Circuit. Smith responded with legal arguments but no new evidence. Judge Aldrich, assuming the role of an active litigant, also filed several briefs in opposition to mandamus.

The Sixth Circuit granted the relief requested, holding that prisoners have the burden of proving that they have a specialized need to attend depositions conducted by their attorneys. That holding was based upon the Sixth Circuit's conclusion that the penological concerns motivating the Respondents' position were "compelling". That court further held that the non-specific reasons advanced by Smith's counsel in support of his presence were insufficient to overcome those concerns and remanded the matter to the District Court to give Smith an opportunity to show a particularized need to be present at the depositions.

Instead of availing himself of that option, Smith, joined by Judge Aldrich, sought *en banc* review in the Court of Appeals. When that was denied, they filed the petitions at bar.

REASONS FOR DENYING THE WRIT

The Petitioners essentially raise two sets of issues: whether the Sixth Circuit applied the correct mandamus standard and whether its decision improperly divests the district courts of authority over discovery in prisoner cases. On a general level, both groups of issues have been effectively mooted by legislative action. There are also specific reasons why those issues are individually unworthy of review.

A. The Issues Presented Have Been Effectively Mooted by the Prison Litigation Reform Act.

It is well settled that *certiorari* is reserved for the resolution of "important federal questions." See Rule 10 of this Court. The issues raised by the Petitioners do not rise to that level because they have been effectively mooted by the Prison Litigation Reform Act, P.L. 104-134, 110 Stat. 1321 ("PLRA"). That is true in two respects.

First, the PLRA has made it very unlikely that the matters at bar will ever arise again. Their importance is limited to a very specific category of cases, prisoner civil rights cases. The sheer number of prisoner cases has rapidly declined following passage of the PLRA. A. Meehan, *Judicial Business of the United States Courts: 1997 Report to the Director*, (Administrative Office of the United States Courts at 131-132), Table C-2A (noting a 31 percent decline in prisoner civil rights suits in FY 1997). Of that class of

cases, most do not involve depositions taken by counsel, as a recent study has noted that "virtually all" litigating prisoners act as their own attorneys and that 74 percent of such cases are dismissed *sua sponte*. R. Hanson and H. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, (Bureau of Justice Statistics, U.S. Dept. of Justice 1995) at 17-19. In short, the decision below involved a very minute percentage of a very insular category of cases that is declining in over all number. Hence, it does not constitute an "important federal question."

Second, the PLRA's changes to 18 U.S.C. § 3626 preclude district courts from exercising the discretion the Petitioners seek to vindicate. Section 3626(a)(1) prohibits federal courts from granting prospective relief that is not necessary to protect a federal right, and the type of relief ordered by Petitioner Aldrich clearly fits within the broad definition of "prospective relief" provided by § 3626(g)(7). This Court's decisions make it clear that prisoners have no federal right to be physically present at any stage of a civil proceeding. *Price v. Johnson*, 334 U.S. 266, 285-286 (1948); see also *Schwab v. Berggren*, 143 U.S. 442, 449 (1892). Consequently, the type of discretion that the Petitioners seek to preserve has been removed by statute, and their arguments are therefore moot.

B. The Petitioners' Arguments Regarding Mandamus Standards Are Not Properly Before the Court and Raise Nothing More Than Harmless Error.

Both Petitioners ask this Court to review the mandamus standard applied by the Sixth Circuit, as set forth in *In re Parker*, 49 F.3d 204, 206 (6th Cir. 1995). There are two compelling reasons to deny that request.

The first is that the issue was not raised below. The Sixth Circuit, acting with an abundance of caution, asked the parties to brief the propriety of mandamus relief twice before ruling. Both times the Respondents advanced *In re Parker* as the proper standard. The Petitioners did not contest the *Parker* standard either time and hence neither the Sixth Circuit nor the Respondents have had an opportunity to address the issue. Therefore, it is not appropriate to raise the matter for the first time in this Court and *certiorari* should be denied on that ground alone.

Second, even if *Parker* does not provide the correct standard, any reliance upon it was harmless. The alternate standard urged by the Petitioners is the "usurpation of power" test that some courts have derived from *Will v. United States*, 389 U.S. 90 (1967). However, as discussed below, that standard would also require the result reached below because Judge Aldrich's order constituted a usurpation of power when it is evaluated in the light of this Court's decision in *Lewis v. Casey*, 518 U.S. 347 (1996). Therefore, review would be futile given the mandate of 28 U.S.C. § 2111.

C. The Extent of District Courts' Discretion was Conclusively Resolved in *Lewis v. Casey*, 518 U.S. 347 (1996).

Both Petitioners contend that *certiorari* is appropriate because the Sixth Circuit's decision deprived Smith of discovery-related rights afforded normal litigants, arguing that decision improperly divests district courts of discretion in such matters. However, review on those issues is unwarranted because this Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), has already resolved the relative

authority of the courts and correctional officials and the decision below was consistent with *Lewis*.

In *Lewis*, this Court reviewed a district court's order that corrections officials modify operating procedures to accommodate prisoners' litigation-related "rights." *Lewis* held, *inter alia*, that federal courts lacked Article III authority to order such modifications if prisoners do not show actual injury to their ability to prosecute non-frivolous claims regarding the fact, duration of conditions of their confinement. That limitation was imposed to prevent federal courts from improperly taking authority over matters reserved for the executive branch of government and to prevent district courts from "usurp[ing] authority over the prison administrator's core responsibility: institutional security and order," *Id.* at 391 (Thomas, J., concurring). *Lewis* also held that even if such injury is shown, no relief may be granted if the procedures causing the injury were reasonably related to legitimate penological interests under the test set forth in *Turner v. Safley*, 482 U.S. 78 (1987).

In the case at bar, the Sixth Circuit examined the record and determined that Smith made no showing that his ability to prosecute his § 1983 actions was hindered by his being excluded from the depositions. That alone deprived the district court of Article III authority, and hence discretion, to grant the relief requested and indicated that Judge Aldrich's order constituted a "usurpation of power." Moreover, the Sixth Circuit's decision is supported by the fact that the Respondents produced unrefuted evidence establishing "compelling" penological reasons for excluding Smith from the depositions. In sum, the issues raised by Smith have been conclusively resolved by this Court. That provides additional grounds for denying *certiorari*.

CONCLUSION

The Respondents ask that this Court deny certiorari in these cases.

Respectfully submitted,

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December 18, 1998